BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinions of the Courts Below

The findings of fact and conclusions of law of the District Court of the United States for the District of Massachusetts, appear on pp. 15-18 of the record and the opinion of the United States Circuit Court of Appeals for the First Circuit appears on pp. 185-193 of the Transcript and in 143 Fed. 2(d) 907.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered July 20, 1944, (R. p. 193) and the opinion was filed July 20, 1944, (R. p. 185-193). The statute giving this Court jurisdiction is Section 240(a) of the Judicial Code, as amended, (28 U. S. Code Sec. 347). The judgment was rendered in a suit in equity brought under the Patent Statutes to determine the validity and infringement of Letters Patent. The authorities relied upon to sustain jurisdiction are:

Revised Rule 38, Par. 5 (b) of the Revised Rules of the Supreme Court of the United States;

Magnum Import Co. v. *Coty*, 262 U. S. 159;

E. H. Ferree Co. v. *United Shoe Machinery Co.*, 290 U. S. 614 and 708;

McCormick v. *Burnat*, 283 U. S. 784;

Miller v. *Standard Nut Margarine Co. of Florida*, 284 U. S. 498;

Radio Corp. of America v. *Raytheon Mfg. Co.*, 296 U. S. 459;

DeForest Radio Co. v. *General Electric Co.*, 283 U. S. 664;

Sanitary Refrigerator Co. v. *Winters*, 280 U. S. 30;
Paramount Publix Corp. v. *American Tri-Ergon Corp.*, 294 U. S. 464;
Altoona Publix Theatres, Inc. v. *American Tri-Ergon Corp.*, 294 U. S. 477;
Mackay Radio & Telegraph Co. v. *Radio Corp. of America*, 40 U. S. P. Q. 199.

Statement of the Case

The foregoing petition contains a summary of the material facts necessary to an understanding of the reasons relied upon for the allowance of the Writ, as well as the statement of the questions involved in the case. However, for a better understanding of the issues, a brief discussion of the claim in issue is here submitted.

Reading the Claim 29 of Des Rosier's Reissue Patent on Figures 10 to 14 thereof, with reference characters applied, we find the following:

> In a brake control device, *a* controller shaft (24), *braking means* actuated on rotation of said controller shaft, (front wheel brakes actuated by rods 32 and rear wheel brakes actuated by rods 28), a hand lever (52) pivotally mounted on the vehicle, a foot pedal (34) pivotally mounted on the vehicle, means (sleeve 60 connected to hand lever 52, arm 50 projecting integrally therefrom, rod 66 projecting from controller shaft 24) connecting said hand lever to *said controller shaft* 24 to cause rotation thereof to *apply the braking means*, and means connecting said foot pedal (34) *to said controller shaft* (24) to cause rotation thereof to *actuate said braking means*, including a link (92) pivotally connected to said foot pedal (34) having a head (94) threadedly adjustable thereon having a slot (96) in the end thereof near the controller shaft (24) and an arm (82) projecting from said controller shaft (24) having a pin (98) therein adapted to register in said slot (96).

It will be seen that it calls for *a* or *one* controller shaft and "braking means" actuated on rotation of said controller shaft, thus in Figure 10 rotation of *the single* controller shaft 24 operates through the rods 28, the rear wheel braking means and through the rods 32, the front wheel braking means (as referred to in line 2). Referring to line 7 of the claim, the phrase "the braking means," therefore, means the same braking means as referred to in line 2, namely both those for the front wheel and rear wheel brakes and "said braking means" in line 9 refers to the *same braking means* for the front wheel and rear wheel brakes as referred to in lines 2 and 7, thus both the hand lever and the foot pedal *must actuate a single controller shaft* and apply all of the *same braking means* in each instance through the *same controller shaft.* In other words, all four brakes on the four wheels are simultaneously actuated equally from a single controller shaft when either the foot pedal or the hand lever is actuated, or both are actuated together.

This was the interpretation placed on the claim by the expert examiner of the Patent Office upon allowance of the application over the reference publication "Automotive Industries," dated June 16, 1921. It was this reference publication, however, that was relied upon by the Circuit Court of Appeals, giving a different interpretation thereto, for invalidating this claim. In rendering its opinion, relying on this publication, the Appellate Court, however, overruled all of the grounds for the decision in the District Court.

It had been realized in the early stages of the manufacture of automobiles that it was desirable to provide brakes on the front wheels as well as the rear wheels. While it was apparently simple enough to apply the same braking pressure on one brake on each of the rear wheels, since each continuously rotated in the same plane, an inherent diffi-

culty and problem existed in applying suitable braking pressure to the front wheels by reason of the swivelling of said front wheels as they were turned for steering purposes. There was a continuous demand for more and heavier brakes, but the only suggestions for applying braking pressure to the front wheels involved complicated structures.

Des Rosiers first found out that the successful operation of brakes depended on the evenness of wear on each brake, for if one brake wore more than another, it would cease to function on movement of a common actuator, and if one or more of the remaining brakes then wore more it would successively be put out of action on movement of a common actuator until only one wheel brake worked. The teachings of the prior art provided for each brake wearing different amounts with compensation provided between the brakes for wear. *The petitioner was the first to realize that if equal pressure was at all times applied through a common actuator (a new mode of operation), all of the brakes would be worn equally and evenly (a new and beneficial result).*

The prior art thought that complicated equalizers, springs or controller shafts for the brake on each wheel were necessary to compensate for varying degrees of wear of each brake, which occurred particularly on the front wheel brakes when swivelling. The petitioner provided a system which furnished equal pressure at all times on each of the brakes and thereby was able to ignore the effect of swivelling of the front wheels in use. This concept of applying equal pressure by equal movement of the brake applying means for each brake is set forth in the claim which calls for a single controller shaft and braking means (namely for all the brakes) actuated by the rotation of said controller shaft. The movement of this single controller shaft transmitted equally and evenly to each brake insured the same movement of the brake applying means on each wheel and hence, equal wear. In the "Automotive Industries"

publication, relied on by the Appellate Court for anticipation, the movement of the single controller shaft was not transmitted equally to each brake but purposely varied by the lost motion connection springs described more fully later on in the brief.

The respondent for a long while did not appreciate the efficacy of petitioner's invention. It still believed that complicated equalizers were necessary and put them in use on the Model A Ford automobiles (R. 96, 97). Finally, to its surprise, the respondent found that equalizers were no longer necessary with the petitioner's simplified structure and that same provided equal wear on all brakes with equalizers eliminated (R. 96, 97). Thereupon, the respondent adopted and used, for a period of six years, without the consent of the petitioner, a braking system employing petitioner's invention. Other manufacturers did likewise, although the latter abandoned mechanical four wheel brake systems long prior to the respondent herein. As a matter of fact, the petitioner's invention was largely responsible for the repeal in many States of laws which at that time required a multiplicity of separate and independent braking systems for automobiles (R. 70, 71 and 100).

Specification of Errors

The specification of errors herein relied upon are those heretofore set forth in the Petition as reasons for the allowance of the Writ, and for sake of brevity are not here repeated.

Summary of Argument

The points of the argument follow the reasons relied upon in the petition for the granting of the Writ and for the sake of brevity are not here repeated.

ARGUMENT

Point I

Departure From Accepted Legal Proceedings

The Circuit Court of Appeals, by its decision herein, has in effect overruled all three conclusions of law filed by the District Court but, in deciding against the petitioner, has utilized an entirely new and additional ground, barely referred to in the record, although fully considered by the Patent Office in the granting of the petitioner's patent. The Appellate Court did not rely for anticipation of petitioner's patent on the patents and publication used by the District Court, but selected the printed publication titled "Automotive Industries," dated June 16, 1921, and held that this publication, with certain revisions, constituted an anticipation. Incidentally, this particular publication was before the Examiner in the Patent Office and in the file wrapper of the application resulting in the patent in issue. The selection by the Appellate Court of such a new ground for anticipation, without petitioner having had a chance to rebut or argue the same, since the Court has denied all petitions for rehearing and remand, results in a departure from the accepted and usual course of judicial proceedings. The petitioner is substantially denied his day in Court and his usual right to appeal from, rebut and/or otherwise argue against the new ground of the decision advanced for the first time by the higher Court. We submit that the Appellate Court should have granted the Petition for Rehearing or the Motion to Remand, in order to consider arguments, or if remanded, evidence, as to the construction and mode of operation of the disclosure of the reference publication, there having been no previous full and complete discussion thereof in the record. It is submitted that in this instance,

the Circuit Court of Appeals has clearly exceeded its proper scope of review, having construed and overruled all conclusions of law in the lower Court favorable to the petitioner yet reaching out beyond its authority and selecting an additional reference publication for use as anticipation, which reference, to say the least, is ambiguous. Such a radical departure from the accepted and usual course of judicial proceedings has so impaired the petitioner's rights as to call for the exercise of this Court's power of supervision under Rule 38, Par. 5 (b), and particularly under the authority of *Magnum Import Co.* v. *Coty*, 262 U. S. 159, and *E. H. Ferree Co.* v. *United Shoe Machinery Co.*, 290 U. S. 614 and 708.

POINT II

Clear Error Apparent on Face of Opinion

The Court held the disclosure in the article appearing in the publication "Automotive Industries" to be an anticipation of the petitioner's invention as claimed (Claim 29). Even a casual inspection of the drawing of this publication will reveal springs between the controller shaft and the rear wheels, which the Court overlooked or ignored entirely. Such springs make it impossible for the structure employing same to transmit movement of the single controller shaft evenly to the respective brakes.

The Court in ruling that the disclosure in the reference publication anticipates what the petitioner contended was covered by his claim is equivalent to stating that the reference disclosed the same mode of operation and produced the same result as the petitioner's invention. In fact, it is apparent on the face of the record that the modes of operation of the two structures in issue are not only different, and necessarily so by reason of the use of springs in the reference, but accomplish different results. In fact, the

reference did not solve the problem which Des Rosiers' invention solved and which solution resulted in the wide application and use of the Des Rosiers brake system.

The Appellate Court decision (R. 193) refers to the Figure 5 of the reference publication as showing "to any draftsman or mechanic what the plaintiff *says* is covered by his Claim 29." It is fundamental in patent law that the protection afforded by a patent is that defined by *the claim*, and not what someone "says" the patent covers. To anticipate the claim in issue, it was the duty of the Court to apply the reference to the terms of the claim and show wherein such terms were answered. This the Court failed to do.

In fact, had the Court followed the accepted practice of law and attempted to apply the reference publication to Claim 29, it would also be apparent that said reference did not reveal "means connecting said hand lever to said controller shaft to cause rotation thereof to apply (all) braking means," nor did it reveal "means connecting said foot pedal to said controller shaft to cause rotation thereof to actuate (all) said braking means." Furthermore, an attempted application of the reference to the claim would have revealed that the subject matter of the last five lines of the latter, directed specifically to a pin and slot type of lost motion connection, was not present in the publication.

(Here follow 2 drawings.)

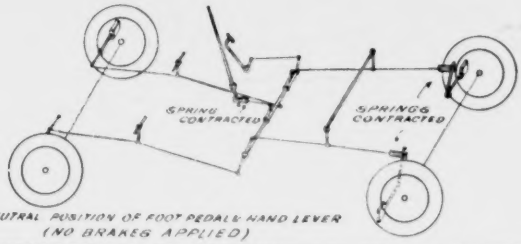
Views showing Operation of Brake System

disclosed in

Automotive Industries Publication

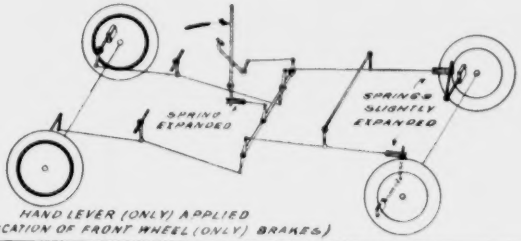
(Darracq)

Fig. 1



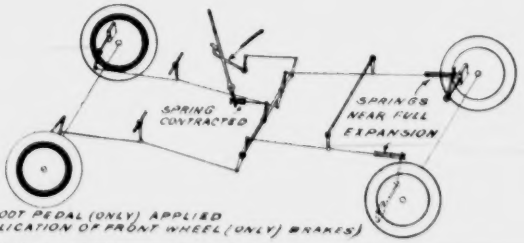
NEUTRAL POSITION OF FOOT PEDAL & HAND LEVER
(NO BRAKES APPLIED)

Fig. 2



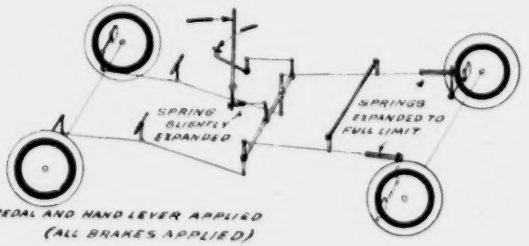
HAND LEVER (ONLY) APPLIED
(SLIGHT APPLICATION OF FRONT WHEEL (ONLY) BRAKES)

Fig. 3



FOOT PEDAL (ONLY) APPLIED
(HEAVY APPLICATION OF FRONT WHEEL (ONLY) BRAKES)

Fig. 4



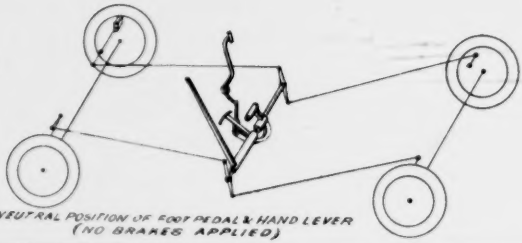
FOOT PEDAL AND HAND LEVER APPLIED
(ALL BRAKES APPLIED)

Views showing Operation of Brake System

disclosed in

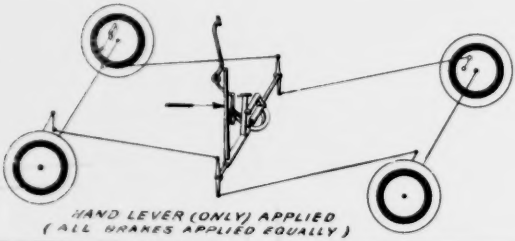
Petitioners Patent

Fig. A



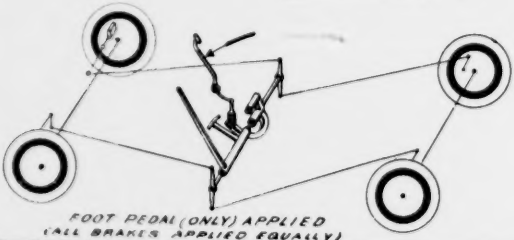
NEUTRAL POSITION OF FOOT PEDAL & HAND LEVER
(NO BRAKES APPLIED)

Fig. B



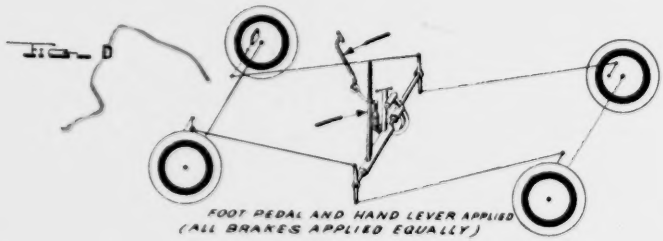
HAND LEVER (ONLY) APPLIED
(ALL BRAKES APPLIED EQUALLY)

Fig. C



FOOT PEDAL (ONLY) APPLIED
(ALL BRAKES APPLIED EQUALLY)

Fig. D



FOOT PEDAL AND HAND LEVER APPLIED
(ALL BRAKES APPLIED EQUALLY)

In amplification of the foregoing list of errors apparent on the face of the opinion of the Appellate Court, we suggest a comparison be made between the actual structures of the patent in suit and the reference publication, as to the respective modes of operation and results achieved thereby. In order to aid this Court in the comparison suggested, we have annexed in the following pages two sheets of drawings, each containing four views showing the operation of the brake system of petitioner's patent and the reference "Automotive Industries" publication. The figures are arranged on each sheet so that the controls of the respective structures correspond, as, for instance, the first figure at the top of each page shows a neutral position of both foot pedal and hand lever, whereupon no brakes are applied. In the second figure (reading down the page) only the hand lever is applied. Merely a casual comparison of these figures (Fig. 2 of reference and Fig. B of patent) shows a marked distinction in the results. For instance, whereas the reference under such conditions shows a slight application of front wheel brakes only, the petitioner's patent with the hand lever only applied shows all four brakes simultaneously applied equally. Again, by a comparison of the third figure of each sheet, wherein the foot pedal only is applied, we find a marked distinction, since in the reference such action will only result in a heavy application of the front wheel brakes only, whereas, in the patent, application of the foot pedal results in all four brakes being simultaneously and equally applied, just as was true in the previous application of the hand lever. Again, the fourth or lowermost figure in each sheet shows an application simultaneously of both foot pedal and hand lever at which time, in both instances, all four brakes are applied, although the application of *equal* pressure on the brakes may only be had by the patented structure. The lack of equal pressure on the brakes in the reference is due to the in-

clusion in that structure of expansible springs between the controller shaft and the rear wheels, the details of which will be discussed herebelow.

Particular attention is called to the fact that in order to effectively apply all four brakes in the reference (Fig. 4) both the foot pedal and the hand lever must be applied. In contradistinction thereto, all four brakes of the patent may be applied simultaneously and equally by either application of the hand lever alone (Fig. B) or application of the foot pedal alone (Fig. C). Obviously, therefore, the reference structure is incapable of accomplishing the same results as achieved by the patent structure. This statement and showing leads to the question of why the reference cannot accomplish the same results as the patented structure and the answer is a difference in construction with a difference in mode of operation, which apparently the Appellate Court entirely overlooked.

In order to explain the difference in structure, it must be stated that in preparing the drawing of the reference, Fig. 4 thereof was reproduced (with the exception of the heavy brake-band illustration) from Fig. 5 of the publication. The remaining figures offer the only logical explanation of the application of the brakes and the positions of the spring structures upon the actuation of either the foot pedal or the hand lever or both, as more fully explained herebelow.

Des Rosiers' application while pending in the Patent Office was involved in an interference with an application of the party Dodge, assignor to the Bendix Brake Company, the file of which record interference is defendant's exhibit Q of this record. During the course of this interference and the present suit, fourteen different explanations of Figure 5 of the publication reference in issue have been presented. We submit that our interpretation of the

operation of this reference structure, as mentioned hereabove, and more fully explained herebelow, is the only logical one of the various explanations offered to date.

In this reference publication, a spring is located in the connection between the hand lever and the controller shaft and identical springs are shown at the rear of each connection between the controller shaft and each rear wheel brake. The Appellate Court, no doubt properly, states that a lost motion connection (probably meaning the first mentioned spring) is indicated between the hand brake lever and the controller shaft. However, he failed to mention the other two springs for the rear wheel brakes, nor did he give any consideration to the action thereof nor to the results achieved by the action thereof. These springs were placed there for some purpose and they must perform some function. Examination of Figure 5 of the reference publication shows that the foot pedal and also the hand lever are applied, so that the four brakes must necessarily be in effective braking position. Hence, we have so illustrated the brakes in Fig. 4 of the annexed sketches. In this position of the lever and foot pedal, the two rear springs at the rear wheels are necessarily expanded to the full limit, so they no longer function as lost motion connections, but permit application of the brake pressures to the rear wheels. In this position the spring connected with the hand lever, which is also a lost motion connection, must necessarily be only slightly expanded.

In the neutral position of the structure, as shown in Fig. 1, all three of the springs are contracted. Upon application of the hand lever only (Fig. 2) the spring between the hand lever and the controller shaft is necessarily expanded, but the two rear springs are only slightly expanded, to function as lost motion connections. A mild braking action thus takes place on the front wheels, as indicated by the heavy circular lines on the front wheels of

Fig. 2. No braking effect takes place on the rear wheels, since the lost motion spring connections have not at that stage been expanded to their fullest extent. Upon the application of the foot pedal (Fig. 3), the brakes on the front wheels will be heavily applied, as shown by the more heavily denoted circular black lines in said figure. In such an application, the rear spring connections are expanded to a point near their limit of expansion, yet failing said limit merely act as lost motion connections and prevent any application of rear wheel brake pressure. As aforesaid, when both the foot pedal and the hand lever are applied the rear springs are expanded to their fullest limit, so that they no longer function as lost motion connections, but permit the application of the rear, as well as the front wheel, brakes.

As aforesaid, this is an entirely different structure and mode of operation from that disclosed by the patentee. In addition, attention is directed to the fact that the patentee's structure permits equal pressures to be applied to all four wheels at all times, so that all brakes will wear evenly. With the structure of the reference, however, evenness of wear is impossible. If the hand lever or foot pedal only are applied only the front brakes will be worn and when both are applied together, both the front and rear wheel brakes will be worn. Thus the front wheel brakes are subject to much more wear than the rear wheel brakes and hence, Des Rosiers' new and beneficial result of equal wear on all brakes was never achieved in the reference structure.

We submit that these errors found on the face of the opinion of the Circuit Court of Appeals, apparent from a reading of the reference publication and apparent from a reading of the claim in issue, call for correction under the supervisory power of this Court. (Supreme Court Rule 38, Par. 5 (b); *Magnum Import Co.* v. *Coty*, supra; and *E. H. Ferree Co.* v. *United Shoe Machinery Co.*, supra.)

Point III

Decision in Conflict With Previous Decisions of the Supreme Court and of the First Circuit

In deciding the case, the Circuit Court of Appeals, relying on a new ground, gave its own warped interpretation to a diagrammatic and skeletonized drawing in a reference publication and held the same to be an anticipation, with possible changes therein, of the patent in suit.

(a) As aforesaid, the application of the patent in suit was involved in an interference with the party Dodge (respondent's exhibit Q). In the record of that case and in the instant case, as aforesaid, some fourteen different and, doubtless, sincere opinions were presented as to the structure and operation of the reference publication in issue. It is only a diagrammatic showing and if petitioner's interpretation of its structure and operation be not accepted, certainly then this skeletonized drawing must be considered vague, indefinite and ambiguous. Certainly this reference does not clearly disclose the claimed invention beyond a reasonable doubt, a principle of law established by this Court in *Barbed Wire* case, 143 U. S. 275; *Deering* v. *Winona Harvester Works*, 155 U. S. 300; *Adamson* v. *Gilliland*, 242 U. S. 350; *Eibel Co.* v. *Paper Co.*, 261 U. S. 60. We know of no decisions of this Court repudiating the aforementioned decisions sustaining this principle of law.

(b) As heretofore shown by the comparison between the detailed annexed drawings of the patent and the reference a new mode of operation producing a new and beneficial result was presented by the patentee. Notwithstanding the erroneous reasoning of the Appellate Court, it will be seen that the Des Rosiers device has an entirely different mode of operation from that of the reference publication and pro-

duces a new result, namely, that the brakes wear evenly on continued even braking pressure on all of the brakes in use. As a result thereof, the Des Rosiers brake system displaced the complicated brake structures, such as that of the reference, wherein different brakes were applied at different times, thereby causing unevenness in wear, which, obviously, prevented effective braking action. The principle of law applicable to such a situation, established in *Webster Loom Co.* v. *Higgins*, 105 U. S. 580, and *Diamond Rubber Co.* v. *Consolidated Power Co.*, 220 U. S. 428, we submit, has never been overruled.

(c) The reference publication, as shown heretofore, does not meet the structure shown and claimed in the patent, nor is it intended to operate in the same manner. As aforesaid, the use of springs between the controller shaft and the rear wheel brakes in such reference presents a widely different structure, causing an entirely different operation and result from that revealed by the patentee. Nevertheless, the Appellate Court relied on this reference as an anticipation, although stating that additions might be made thereto to produce what the patentee disclosed. In order to defeat a patent, a prior publication must present a substantial reproduction of the patented improvement in such full, clear and exact terms as to enable any person skilled in the art to which it appertains to make, construct and practice the invention. As aforesaid, some fourteen different interpretations of the construction and operation of this reference have been presented. This alone would seem to indicate that the publication is not sufficiently full, clear and exact in terms to enable one skilled in the art to produce same. The explanation of the Appellate Court as to the construction and operation is diametrically opposed to that of the petitioner. The Courts in various Circuits throughout the United States are agreed on this principle of law,

established by this Court in *Seymour* v. *Osborne*, 78 U. S. 516 and *Eames* v. *Andrews*, 122 U. S. 40. See *Permutit Co.* v. *Wadham*, 13 Fed. (2d) 454; *Victor Talking Machine Co.* v. *John Wanamaker*, 275 Fed. 452; *Atlantic Gulf & Paper Co.* v. *Wood*, 288 Fed. 148.

The Appellate Court relied on three cases for its contention that drawings may be used to anticipate as well as words, if they teach to the art what the patentee claims as his invention. Petitioner does not take issue with the Court on this principle of law, but does take issue with the Court on the application of the principle to the situation at bar, since the disclosure in the reference publication does not reveal the structure and mode of operation of the patentee in sufficiently clear, full and exact terms. In one case cited by the Court, *Jockmus* v. *Leviton*, the drawings there were held *not* sufficiently complete to be an anticipation for lack of complete disclosure, as is true with the reference in the case at bar.

In another case cited by the Appellate Court, In Re *Bager*, it was expressly held that an accidental showing in a prior patent does *not* anticipate a later invention unless the earlier invention was designed, adapted or used to perform the function of the second invention. In the case at bar, we have already shown that the reference publication was not designed, adapted or used to perform the function of petitioner's invention.

In the third case, In re *Boyd*, relied on by the Court, it was held that a description for purposes of anticipation may be by drawings alone, but there is nothing in this decision which refutes the well-known and established principle of law that the drawings to be relied upon as anticipations must be full, clear and in exact terms, so as to enable any person skilled in the art to produce or practice the same. That condition has not been met by the reference publication relied on by the Circuit Court of Appeals. The rule

of law established by this Court in *Seymour* v. *Osborne* and *Eames* v. *Andrews,* supra, has not been repudiated.

(d) The reference publication is a skeletonized diagrammatic view of an alleged four wheel brake system. The Appellate Court stated that a lost motion connection could be added thereto which is indication that the showing is not full and complete. It would be more than a mere addition of a feature to modify this reference structure by stripping it of the two springs illustrated therein on the rear wheel brake connections and connect the foot pedal by a lost motions connection to the controller shaft and make each of the connections from the controller shaft to the rear wheel brakes rigid. Such a modification would be necessary to achieve the Des Rosiers structure and the new and beneficial results resulting therefrom. Such a structure is not suggested in either the description or the illustration of this reference and a revision and reconstruction thereof to produce the same would, we submit, amount to the exercise of invention. Since it is apparent that this reference publication was never designed by its maker, nor adapted or actually used for the performance of the same functions as those of the patentee, and must be modified to accomplish the functions performed by the patent in question, the principle as set forth by this Court in *Topliff* v. *Topliff*, 145 U. S. 156, and *Krementz* v. *Cottle Co.*, 148 U. S. 562, never overruled, is here applicable.

(e) It is a well established principle of patent law that a patent should be construed, if possible so as to uphold same, not invalidate it. *Mossberg* v. *Nutter*, 135 Fed. 95; *Maliguani* v. *Jasper Marsh Co.*, 180 Fed. 442; *Sun Ray Corp.* v. *Bellows-Claude Neon Co.*, 49 Fed. (2d) 886; *Bragg-Kliesrath Corp.* v. *Walter S. Vogel & Co., Inc.*, 67 Fed. (2d) 521.

Point IV

Apparent Conflict of Decisions

The same reference publication "Automotive Industries" relied on as an anticipation by the Circuit Court of Appeals of the First Circuit in determining the instant case, was also before the Court of Customs and Patent Appeals as a reference for purposes of anticipation of a structure similar to that of petitioner's and discarded. As aforesaid, the application of this petitioner was, during its pendency in the Patent Office, in interference with the application of a party *Dodge*. The interference was dissolved, yet the petitioner obtained his patent over this particular reference publication in issue. However, the Dodge application was rejected by the Patent Office Tribunals and an appeal was taken to the Court of Customs and Patent Appeals. In Re *Dodge*, 74 Fed. (2d) 756, in which there was some discussion as to what is revealed by the "Automotive Industries" reference. Bearing in mind that Dodge was in interference with Des Rosiers, this petitioner, and the subject matter of the two applications had many features in common, it is interesting to note that the Court of Customs and Patent Appeals said, at page 757

> "Although the 'Automotive Industries' reference shows a lost motion connection between the emergency lever and the brakes, it does not disclose such a connection between the foot pedal and the brakes * * *."

Here is an interpretation of that reference which definitely states it does *not* disclose a connection between the foot pedal and the brakes and it is a fact that the Des Rosiers invention does disclose a lost motion connection between the foot pedal and the brakes and such lost motion connection is defined specifically in the last five lines of Claim 29.

Obviously if this "Automotive Industries" reference had been an anticipation of the Des Rosiers invention, it would have been cited as an anticipation of the Dodge alleged invention, but the Court of Customs and Patent Appeals specifically held it did not disclose certain structure common both to Dodge and Des Rosiers and did not, as a matter of fact, rely on this reference publication as an anticipation of Dodge.

We find, therefore, that the reasoning in the decision of the Court of Customs and Patent Appeals on this reference publication is substantially in conflict with the reasoning of the Circuit Court of Appeals with respect thereto. Such conflict, we submit, justifies the granting of the Writ, as provided in Supreme Court Rule 38, Par. 5 (b) and *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30.

Point V

No Further Conflict Possible

As aforesaid, the Des Rosiers patent in issue expired in 1942, during the pendency of this litigation, and all manufacturers of motor vehicles, including the defendant, discontinued employing mechanical four wheel brakes of the type shown by this patent some years ago. Any claims against other manufacturers appear to be barred by the Statute of Limitations. Therefore, it would appear to be substantially impossible to obtain further adjudication of this patent involving a conflicting decision in another Circuit. Under the circumstances, we submit, this Court has authority to grant the Writ herein under authority of *Paramount Publix Corp.* v. *American Tri-Ergon Corp.*, 294 U. S. 477; and *Mackay Radio & Telegraph Co.* v. *Radio Corp. of America*, 40 U. S. P. Q. 199.

Conclusion

For the reasons aforesaid, we submit that the Writ of Certiorari should be granted and the opinion of the Circuit Court of Appeals for the First Circuit reversed. Such action is most earnestly prayed for.

Respectfully submitted,

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